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No. 83-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

COMMITTEE FOR AN INDEPENDENT P-I; PEOPLE OPPOSED TO A ONE-NEWSPAPER TOWN; COMMITTEE FOR A FREE PRESS; LONGVIEW PUBLISHING COMPANY; ROBINSON COMMUNICATIONS, INC.; AND NORTHSHORE PUBLISHING COMPANY,

Petitioners,

v.

WILLIAM FRENCH SMITH, Attorney General of the United States; THE HEARST CORPORATION; and SEATTLE TIMES COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS THE HEARST CORPORATION AND SEATTLE TIMES COMPANY IN OPPOSITION

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QUESTIONS PRESENTED

1. Where it has been established that a newspaper has been managed competently and reasonably and that its trend toward failure is probably irreversible under any management or ownership, does the Newspaper Preservation Act, 15 U.S.C. §§ 1801-1804 (the "Act"), which defines a "failing newspaper" as a newspaper "in probable danger of financial failure," also require the owner of the newspaper to indicate that it is for sale and to explore fully that alternative as a prerequisite to a finding by the Attorney General that the newspaper is a "failing newspaper" entitled to approval of a joint newspaper operating arrangement?

2. Where it has been established that a newspaper's trend toward failure is probably irreversible and that, without the continued substantial financial support of its owner, it would probably close, does the Act also require proof of consideration of plans to close the newspaper if approval by the Attorney General is not obtained?

3. Where the provisions of a joint newspaper operating arrangement are in strict accord with those expressly permitted by the Act, does the Act also require inquiry into any possible future competitive impact of such an arrangement or its provisions?

4. Would a possibility that a joint newspaper operating arrangement might have a future competitive impact on other newspapers in the market require a determination that the Act had been applied so as to violate the First Amendment?

5. Does a facially neutral statute providing for administrative approval of an antitrust law exemption available to all qualifying newspapers create a license or prior restraint violative of the First Amendment?

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BRIEF OF RESPONDENTS THE HEARST CORPORATION AND SEATTLE TIMES COMPANY IN OPPOSITION

Respondents pray that the Court deny the Petition for writ of certiorari.

STATEMENT OF THE CASE

THE PROCEEDINGS BELOW

This case arises out of an Application filed with the Attorney General on March 27, 1981 by Respondents Seattle Times Company and The Hearst Corporation ("Hearst") (sometimes collectively referred to as the "Applicants") for

approval of a joint newspaper operating arrangement ("JOA") involving *The Seattle Times* (the "Times") and the Hearst-owned *Seattle Post-Intelligencer* (the "P-I"), pursuant to the Newspaper Preservation Act, 15 U.S.C. §§ 1801-1804, App. 201a-203a (the "Act").[1] Under a JOA, two independently-owned newspapers combine their commercial functions while maintaining separate and independent editorial and reportorial staffs and policies. *See* 15 U.S.C. § 1802(2), App. 201a.

The Application and the issues raised in the Petition have been subjected to four levels of administrative and judicial review. An administrative law judge ("ALJ") presided over a four-week evidentiary hearing and recommended that the Application be approved.[2] App. 153a. The Attorney General approved the Application on June 15, 1982, adopting, with one exception, the recommended findings of fact and legal conclusions of the ALJ. App. 61a. Petitioners then brought this action in the District Court for the Western District of Washington, which, while leaving all but one of the Attorney General's findings undisturbed, held his Order approving the Application invalid, on the basis that Hearst was first required to explore fully the possibility of selling the P-I. App. 40a-47a, 50a. A three-judge panel of the Court of Appeals for the Ninth Circuit, concluding that the Applicants had fully satisfied the requirements of the Act, unanimously reversed the district court and upheld the validity of the Attorney General's Order. No rehearing or stay was sought, and the Applicants implemented the JOA on May 23, 1983.[3]

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[1] For ease of reference, this brief uses the same citation abbreviations as the Petition. *See* Petition at 1-2 n.1. Hearst is a privately-held corporation with a number of subsidiaries, all wholly-owned. Seattle Times Company, of which Blethen Corporation, a privately-held corporation, owns 50.5% of the common voting stock and Ridder Publications, Inc. the other 49.5%, has two wholly-owned subsidiaries. Ridder Publications, Inc. is affiliated with Knight-Ridder Newspapers, Inc., a publicly-held corporation.

[2] The ALJ was Judge Daniel H. Hanscom, former Chief ALJ for the Federal Trade Commission. The Attorney General allowed certain suburban newspaper publishers and groups, most of which are named as Petitioners, to participate in the hearing as intervenors. The Assistant Attorney General in charge of the Antitrust Division was also a party in the hearing, as required by the Regulations under the Act, 28 C.F.R. § 48.10(b), App. 213a, but had no adjudicative function.

[3] The Times now produces, prints and distributes both papers. The P-I's advertising, circulation, production and other commercial departments have been disbanded, except for a small administrative and business staff. Edito-

(footnote continues)

The Petition, although purporting to seek a review of the law applied below, in reality seeks yet another *de novo* factual review, and would require this Court to accept factual premises which have been rejected by the ALJ, the Attorney General, the court of appeals and, for the most part, even the district court.

THE ACT AND ITS BACKGROUND

To qualify for the protection of the Act, which provides an antitrust exemption, JOA's entered into after the Act's passage must be approved by the Attorney General. Prior to granting approval, the Attorney General must determine that one of the papers in the JOA is a "failing newspaper," 15 U.S.C. § 1803(b), App. 202a, defined as "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." *Id.* § 1802(5), App. 202a. He must also determine that approval of the JOA "would effectuate the policy and purpose of [the Act]." *Id.* § 1803(b), App. 202a. That "policy and purpose" is set forth in the text of the Act, *id.* § 1801, App. 201a:

> In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this [Act].

The Act was designed to establish a less severe standard than that applied in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), which held that the 1940 JOA between the Tucson newspapers violated the antitrust laws. *See, e.g.*, S. Rep. No. 535, 91st Cong., 1st Sess. 4 (1969) [hereinafter cited as Senate Report]. In *Citizen Publishing*, the Court rejected the

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(footnote continued)

rial competition, however, has been preserved, and the P-I's editorial and reportorial staffs remain separate and independent, as required by the Act and the JOA.

newspapers' "failing company" defense because the allegedly failing newspaper had not established the three elements of that defense: (1) that it was on the brink of liquidation, (2) that its prospects of reorganization were "dim or nonexistent," and (3) that there were no available noncompeting purchasers for it. 394 U.S. at 137-38.[4]

Citizen Publishing jeopardized JOA's then in effect in twenty-two cities. Congress was concerned not only with the preservation of editorial competition in those cities, but also with the dramatic decline of newspaper competition in other markets, only forty-five of which still had commercially competitive metropolitan newspapers in 1968. H.R. Rep. No. 1193, 91st Cong., 2d Sess. 4, *reprinted in* 1970 U.S. Code Cong. & Ad. News 3547 [hereinafter cited as House Report]. Attempts to start new metropolitan newspapers in competition with existing newspapers had been uniformly unsuccessful. 116 Cong. Rec. 23,164 (1970) (statement of Rep. Udall). The Act "grandfathered" the pre-existing JOA's (*see* 15 U.S.C. § 1803(a), App. 202a), and provided a less stringent standard under which new JOA's could obtain exemptions from the antitrust laws as applied in *Citizen Publishing*.

The wisdom of Congress in passing the Act has been borne out. When the Application for approval of this JOA was filed in March 1981, only thirty-two of the more than 1500 cities with newspapers still had two or more metropolitan newspapers in commercial competition. Finding 7, App. 74a. Of the nation's fifty-nine largest cities, only sixteen still had such competition. Int. Ex. 283. Washington, D.C. lost its second paper before the hearing, and the early deaths of the second papers in cities such as Philadelphia and Cleveland were forecast at the hearing.[5] Finding 5, App. 73a; Tr. 164, 166. Although the Act has not

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[4] The first two questions presented in the Petition, despite the claim to the contrary (Petition at 15-16 n.12), would introduce these three elements into the Act and thus resurrect the *Citizen Publishing* standard.

[5] Petitioners have brought to the Court's attention their unsuccessful request to the court of appeals to take judicial notice of the recent sale of Hearst's Boston paper. Petition at 15 n.11. In opposing that request, the Applicants asked that if the request were granted, judicial notice should also be taken of the recent closures of the *Philadelphia Bulletin, Cleveland Press* and *Buffalo Courier-Express*.

preserved competing metropolitan dailies in these cities, it has preserved competing papers in more than twenty other cities where the papers have been able to negotiate JOA's, including Chattanooga and Cincinnati, where JOA's have been approved since the Act's passage. The Act now also preserves editorial competition between the two Seattle dailies.

THE MATERIAL FACTS

Petitioners' arguments are based on factual premises that directly conflict with the Attorney General's findings. The hearing produced overwhelming evidence to support his findings to the following effect: national newspaper trends, the economic forces impacting newspaper publishing, and the characteristics of the Seattle market all indicate that the P-I's demise as a commercially separate newspaper is virtually inevitable (Findings 4-23, App. 71a-80a); the P-I's dramatic circulation and advertising declines and its staggering financial losses present a classic picture of a "failing newspaper" (Findings 24-93, 131-36, App. 80a-105a, 125a-126a); losses for the P-I as a separate commercial operation can only be expected to increase (Findings 110-15, App. 112a-117a); based on knowledgeable expert opinion (*see* Findings 118-30, App. 118a-124a), no newspaper has ever been able to reverse a trend like the P-I's and return to profitability (Finding 123, App. 120a-121a); it is not probable that any steps which Hearst or a new owner might try could improve the P-I's prospects (Findings 147-55, App. 131a-135a); and the P-I "has fallen so far behind, *the probability is that its decline is irreversible*" (Finding 144, App. 129a (emphasis added)). Indeed, "[w]ere it not for infusions of capital from Hearst, the probabilities are that the Post-Intelligencer would have failed long ago." App. 139a.

The Attorney General found that Hearst ownership and management were not the source of the P-I's problems (Findings 94-109, App. 105a-112a), and that the conclusion that "new management probably would not improve the P-I's financial prospects" was "amply supported by the record." App. 60a.

These findings have been upheld by the court of appeals. They accurately represent the factual record. By using bits and pieces of evidence out of context, Petitioners try to construct an

alternative factual picture totally at odds with that found by the Attorney General. This attempt cannot alter the stark reality, recognized by Hearst and confirmed by the Attorney General, that without a JOA the P-I's precipitous financial and competitive decline would continue, no matter who owned the newspaper or how it was managed.

SUMMARY OF ARGUMENT

The decision of the court of appeals conflicts with no decision of any other court and decides no important question of federal law which should be settled by this Court. It turns mainly on the facts, which have been found by the trier of fact, based on substantial evidence, to be contrary to the assumptions on which Petitioners base their arguments.

Thus, the record has been found not to support, and is inconsistent with, the claims underlying each of the questions presented by Petitioners (Petition at i-ii): that buyers are available "who could and would continue" the P-I's independent operation (Question 1); that without a JOA "the two newspapers will continue publishing independently" (Question 2); and that "the editorial voices of smaller competing newspapers would be impaired" by the JOA (Question 3; *see also* Questions 4 and 5).

Petitioners' arguments that the Act requires exploration of sale, consideration of closure, and inquiry into competitive impact not only lack factual underpinning, but also are legally defective in that they would read into the clear and explicit language of the Act requirements which Congress did not intend. Petitioners' constitutional arguments, as well, are based on unsupported and incorrect factual premises concerning competitive injury and discriminatory treatment, and are also unsupported by any principle of constitutional law established by the decisions of this Court. Moreover, Petitioners lack standing to raise their constitutional arguments.

REASONS WHY THE WRIT SHOULD BE DENIED

PETITIONERS HAVE FAILED TO PRESENT ADEQUATE REASONS FOR A GRANT OF CERTIORARI

Petitioners show no "special and important reasons" for review by this Court. They cannot argue that the unanimous decision of the court of appeals is in conflict with the decision of any other court, or that the court departed in any way from the usual course of judicial proceedings. *See* Sup. Ct. R. 17.1.

The reasons Petitioners offer for granting the Petition are grounded largely in their antipathy to the Act.[6] They argue that an unfettered application of the antitrust laws is indispensable to a free press (Petition at 7), and that the P-I, as a participant in a JOA, will be a "commercial appendage" to the Times and will cease to be a vigorous editorial voice (*id.* at 7-8). These arguments, discussed briefly below, are irrelevant and are also contradicted by the legislative history of the Act and the record here. More important, since Petitioners' other arguments are predominantly factual rather than legal, the case does not involve "an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 17.1(c). This Court does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925).

A. The JOA Will Enhance, Not Inhibit, Freedom Of The Press And Competition In Thought And Ideas.

In hopes of attracting the Court's attention, Petitioners suggest that the JOA and the Act itself are antagonistic to a free press and editorial competition. Petitioners are wrong.

The Act was passed because the strict application of the antitrust laws to joint newspaper operating arrangements threatened editorial competition—a kind of competition that

[6] Petitioners repeatedly invoke the rule of construction that exemptions from the antitrust laws should be narrowly construed, as if the mere invocation of this rule were a basis for disapproving the JOA. *See, e.g.*, Petition at 9, 12. The court of appeals succinctly dealt with this contention: "Simply put, we will not emasculate the Act in the guise of narrowly construing it." App. 30a; *see WTWV, Inc. v. National Football League*, 678 F.2d 142, 143 (11th Cir. 1982) ("[C]ourts should interpret statutory language in a way that accomplishes the obvious purpose of Congress . . . .").

the antitrust laws were not designed to protect. As Senator Goldwater stated during Senate debate on the Act:

> If the first amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the public welfare, then surely it is necessary that we pass the pending bill.

116 Cong. Rec. 1795 (1970).[7]

About fifty newspapers are currently published through JOA's, including the metropolitan dailies in San Francisco, St. Louis, Miami, Pittsburgh, Cincinnati, Columbus, Salt Lake City, Nashville and Honolulu. The legislative history contains numerous statements that the failing paper in a JOA, far from becoming "a commercial appendage to its dominant partner" (Petition at 7), may be preserved as a fiercely competitive editorial voice.[8] In the words of Representative Quillen:

> When the cynic says competition will not long survive, he is speculating. When I state that the competition has survived and continues without a sign of diminution, that is fact. . . . Thus the cynic is answered on the basis of experience—that the competition of thoughts and ideas, so essential to our Government, does survive and is preserved by a joint operating arrangement.

116 Cong. Rec. 23,142 (1970).

Petitioners' contention that the P-I's editorial voice would be "severely weakened" by the JOA (Petition at 7-8) is

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[7] *See also* statement of Senator Inouye: "The Newspaper Preservation Act . . . is in the public interest, is consistent with the first amendment to the Constitution, and does no harm to, but is also consistent with the antitrust laws by preserving essential competition—competition in thought and ideas." 116 Cong. Rec. 1786 (1970).

[8] *See e.g.*, 116 Cong. Rec. 1790, 1795, 23,147, 23,158, 23,161, 23,162, 23,163 (1970) (describing vigorous editorial competition between the JOA dailies in Honolulu, Tennessee (Nashville, Knoxville and Bristol), Miami, Evansville, Salt Lake City, St. Louis and El Paso, respectively). Hearst and P-I executives testified at the hearing to their strong commitment to maintain vigorous editorial competition in Seattle (Tr. 1200-01, 2140-41)—competition which is also in Hearst's financial interest since the profits of the JOA, and thus Hearst's share of those profits, depend in large part on the P-I's continued ability to retain and attract readers.

supported only by the speculation of a disgruntled former editor. Tr. 3446-47, 3534-35, 4130-33. Petitioners' mention of the P-I's loss of a separate Sunday edition ignores the fact that under the JOA, six pages in the joint-masthead Sunday product are reserved for P-I editorial material.[9] The newshole (news content in relation to advertising content) formula in the JOA, incorrectly characterized as "restrictive" (Petition at 8, 23), is a necessary part of any JOA, and enhances, rather than restricts, the P-I's news coverage capability. The formula puts the P-I and the Times in parity, with a minimum newshole which exceeds the P-I's average in recent years. The JOA also permits the P-I to increase its newshole beyond the formula if Hearst bears the additional cost. Tr. 1199-200; Hearst Ex. IBQ-BS. As to the alleged "loss of quality employees" (Petition at 8), the JOA does not affect the number of reporters or other editorial personnel at the P-I. If anything, financial security under the JOA will provide the P-I with the opportunity to expand its editorial staff and its news coverage generally.[10]

In short, the JOA enhances and is fully consistent with freedom of the press. It will fulfill the policy and purpose of the Act by preserving for the Seattle community two fully independent and competitive editorial voices where otherwise there would probably be but one.[11]

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[9] Elimination of the P-I's separate Sunday edition is necessary because the Times production facility, like those used by most other JOA's, cannot handle two Sunday morning products.

[10] As the Senate Report points out at pages 3-4: "Allowing newspapers in competitive financial difficulty to work out agreements with a healthy newspaper or another failing newspaper in the same market will give the newspaper under competitive pressure the financial security and stability necessary for independent behavior."

[11] Petitioners' litany of "multiple *per se* violations" of the Sherman Act (Petition at 8-9) is both exaggerated and beside the point. The operative provisions of the JOA are expressly permitted by the Act, 15 U.S.C. § 1802(2), App. 201a, and are typical of the twenty-some other JOA's currently operating throughout the country. Moreover, much of what Petitioners complain of, including joint production and distribution facilities, a joint Sunday paper, optional cost-justified combination advertising rates, the sale of Sunday and combination advertising by a joint entity, and agreement on publication times, is permitted by the antitrust laws even absent the Act. *See United States v. Citizen Publishing Co.*, 1970 Trade Cas. (CCH) ¶ 73,094 (D. Ariz. 1970).

B. The Issues Presented By Petitioners Do Not Warrant This Court's Attention, Since Those Issues Either Are Predicated On Factual Assumptions Rejected Below, Or Are Otherwise Lacking In Merit And Importance.

The issues presented in the Petition do not rise to the level of importance justifying review by this Court. Petitioners stress that this is the first case involving a post-Act JOA to become the subject of a reported court decision, but that is no reason for granting certiorari.[12]

The fact-intensive nature of the decision below militates against certiorari. The court of appeals' reversal of the district court on the "buyer" issue—the subject of Petitioners' lengthiest attack—was based on the determination that the Attorney General was supported by substantial evidence in making the *factual finding* that it is unlikely that new management would be any more successful than Hearst in improving the P-I's financial prospects.[13] App. 21a-22a. The ALJ had recommended a finding that "the evidence does not establish that new management would be any more successful than Hearst and current management of the Post-Intelligencer in returning it to profitability." Finding 109, App. 112a. The Attorney General adopted that finding and, in addition, found that the conclusion that new management would probably not improve the P-I's position was "amply supported by the record." App. 60a. The district court then substituted its own view of the facts and ruled that Hearst had not sustained its burden of showing that new management could not succeed, App. 46a, but the court of appeals reversed, holding:

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[12] In the 13 years since the Act was passed, only three other JOA applications have been filed: Anchorage, Cincinnati and Chattanooga. The Attorney General's decision, as upheld by the court of appeals, is not in conflict with any other administrative decision interpreting the Act. *See, e.g., Recommended Decision of Administrative Law Judge Donald R. Moore in re Application by The Cincinnati Enquirer, Inc., and The E. W. Scripps Co. for Approval of a Joint Newspaper Operating Arrangement Pursuant to the Newspaper Preservation Act, 15 U.S.C. §§ 1801 et seq.*, Department of Justice Docket No. 43-03-24-4 (1979) [hereinafter cited as the *Cincinnati Recommended Decision*]; *see also* App. 9a n.2.

[13] Justice White has written of "the prevailing rule, peculiar to Supreme Court litigation, that once a Court of Appeals has found an agency fact

(footnote continues)

> Despite Finding of Fact 109, the district court held that Hearst had not sustained its burden of proving new management could not succeed in turning the P-I around, apparently because Hearst did not respond favorably to purchase inquiries. In light of the existence of substantial evidence in support of Finding of Fact 109, this was in error.

App. 21a.

Petitioners argue that before the factual conclusion can be drawn that a new owner would be unlikely to succeed, the newspaper must be put up for sale and putative buyers must be consulted. *See* Petition at 13. The Attorney General found that he could reach this factual conclusion on the record as it stood, and the court of appeals held that his finding was supported by substantial evidence. App. 21a. This Court's discretionary power of review should not be exercised over such an administrative fact-finding process.

The "buyer" issue is fact-intensive in other respects. Notwithstanding Petitioners' frequent references to "qualified buyers," there were no offers to purchase the P-I, App. 14a; no "buyer" appeared as a witness at the hearing to undergo scrutiny of his background and qualifications; and no "buyer" presented any ideas or plans for improving the P-I's financial or competitive condition. All the information any buyer would need to assess the P-I's prospects had been on public file in Seattle and at the Department of Justice for many months, but no "buyer" came forward to say that he had made such an assessment or that he had even reviewed such information.[14] Although Petitioners argue that buyers will not come forward

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judgment supported by substantial evidence, the case does not merit further review and the appellate function is at an end." White, *Supreme Court Review of Agency Decisions*, 26 Ad. L. Rev. 107, 110 (1974); *see also Appalachian Power Co. v. American Inst. of Certified Pub. Accountants*, 80 S. Ct. 16, 18 (1959) (Brennan, J., in chambers); *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 441 (1917).

[14] There is absolutely nothing in the record to support Petitioners' argument or the district court's factual assumption that "[t]here has been no fair opportunity for prospective buyers to prepare and present their plans to make the P-I profitable." Petition at 13; App. 46a.

when the owner expresses an unwillingness to consider sale (Petition at 13), this argument ignores the fact that Hearst stated to the only "buyer" who surfaced during the many months between announcement of the JOA in January, 1981 and the week before the hearing, that Hearst would carefully consider any bona fide offer. Ex. 2 and 4 to Division Ex. 56. Petitioners thus ask this Court to review and reverse a factual finding that no new owner could likely make the P-I profitable, when Petitioners were unable to produce any "buyer" to present evidence to the contrary.

The other questions presented by Petitioners are also fact-intensive. The "closure" issue, Petition at 16-20, is premised on the assumption that without the JOA, the P-I would continue independent operation. As shown more fully below, this assumption is wholly inconsistent with the administrative findings. Similarly, the constitutional and "anticompetitive effects" issues, Petition at 20-30, depend on a showing of possible future competitive injury resulting from the JOA—a showing which the district court correctly characterized as "speculative." App. 48a. Thus, even these issues turn on the facts.

It should also be noted that this is not entirely a case of first impression, as Petitioners claim. Petitioners' First Amendment arguments have been considered and rejected in two reported cases, *Bay Guardian Co. v. Chronicle Publishing Co.*, 344 F. Supp. 1155 (N.D. Cal. 1972); and *City and County of Honolulu v. Hawaii Newspaper Agency, Inc.*, 7 Media L. Rep. (BNA) 2495 (D. Hawaii 1981). But to the extent that this is a case of first impression, the Court should be even more reluctant to review it. *See, e.g., Vasquez v. United States*, 454 U.S. 975, 976 (1981) (Stevens, J., dissenting) ("Often the law develops in a more satisfactory fashion if this Court withholds review of novel issues until differing views have been expressed by other federal courts.").

THE DECISION BELOW IS CORRECT; PETITIONERS ARE UNLIKELY TO PREVAIL ON THE MERITS

Because Petitioners devote so much attention to the merits of the decision below, Respondents are constrained also to address the merits in some detail.[15]

A. Having Established That The P-I's Trend Toward Failure Was Probably Irreversible Under Any Management Or Ownership, The Applicants Were Not Also Required To Show That The P-I Was Available For Sale And That The Sale Alternative Had Been Fully Explored.

Petitioners' factual position on the "buyer" issue is epitomized on page 13 of the Petition, where they purport to describe the holding of the court of appeals:

> This disposition of the matter is in error. It would allow proprietors to gain antitrust exemptions for newspapers which could be operated successfully by others simply by rejecting the available sale alternative out of hand and thus causing their own weak performance, rather than the newspaper's true potential, to become the measure of the publication's future prospects.

The decision below would allow no such thing. As the findings clearly establish, the P-I's financial failure is not the result of "weak performance" by P-I or Hearst management. *See* App. 105a-112a, 143a. The "newspaper's true potential" was the subject of extensive expert and other testimony, reflected in detailed and thorough findings concluding that the P-I has no reasonable prospect of becoming profitable as a commercially competitive newspaper. *See* App. 68a-137a. As the court below stated, the Applicants "sufficiently negated the possibility that . . . alternatives were available in this case," App. 30a, and established that the P-I's "trend toward failure is irreversible *under any management*," App. 22a. When these facts are

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[15] Absent a conflict with decisions of other courts or an important question of federal law, the incorrectness of a decision is an insufficient reason for granting review. *See* Sup. Ct. R. 17.1; *Watt v. Alaska*, 451 U.S. 259, 276 n.5 (1981) (Stevens, J., concurring) ("[O]ur certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases . . . .").

accepted—as they must be—Petitioners' dispute with the court of appeals evaporates.

Petitioners' legal position is epitomized on page 10 of the Petition:

> As under the Bank Merger Act, 12 U.S.C. § 1828, to which Congress referred in enacting the statute at bar, a refusal to explore the alternative of a sale to new ownership precludes the granting of an antitrust exemption.

The Bank Merger Act, as interpreted in *United States v. Third National Bank*, 390 U.S. 171 (1968), requires no such result. In *Third National Bank*, the Court merely concluded:

> [W]e think it was incumbent upon those seeking to merge in this case to demonstrate that they made reasonable efforts to solve the management dilemma of Nashville Bank short of merger with a major competitor but failed in these attempts, *or that any such efforts would have been unlikely to succeed.*

Id. at 189 (emphasis added). That is precisely the test applied by the court of appeals in this case.[16]

Petitioners distort and mischaracterize the legislative history and the factual record.[17] In summarizing and rejecting Petitioners' factual arguments, the ALJ and the Attorney General dealt with them harshly:

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[16] The Attorney General was of the opinion (correctly, Applicants believe) that the Bank Merger Act is not pertinent to proceedings under the Newspaper Preservation Act. Nevertheless, his factual findings were more than sufficient to satisfy the standards of both statutes. It also should be noted that in *Third National Bank*, there had been an explicit factual determination that poor management had been a cause of the bank's condition. 390 U.S. at 188. Such is not the case here.

[17] For example, neither the legislative history (*see* App. 22a n.10) nor the history of the industry supports the proposition that "failing newspapers" cannot be sold. Petition at 10. The now-defunct *Washington Star* changed hands in 1977, and the *Philadelphia Bulletin*, *Cleveland Press* and *Buffalo Courier-Express* all changed hands even more recently. Tr. 141-50, 162, 165-66, 413, 437. Petitioners are also utterly wrong when they assert, at page 14, "Time after time, the record shows, new ownership has brought success to struggling newspapers." Of the nine examples offered, only the Anchorage, San Antonio and Sacramento papers have changed hands in recent memory. According to the expert testimony, the Anchorage paper remains unprofitable, "moreso now than ever," Tr. 440-41, and there is no evidence that the San Antonio or Sacramento papers were "struggling" when they were sold. In

(footnote continues)

> Essentially, the Intervenors [Petitioners] and the Antitrust Division point to the "morning advantage," the correction of internal problems such as the "suburban conversion," decrease in "downroutes," allegedly more aggressive staff, recent (small) gains in circulation, assertions of former Post-Intelligencer employees that the Post-Intelligencer can succeed, criticism of past management of the paper, and the like, to justify their assertions that the Post-Intelligencer's future is "bright," that it has turned the corner and a little more time will return it to profitability, and that other newspapers have overcome declines and the Post-Intelligencer can do likewise. These Pollyanna-like assertions are not based on anything really tangible. In 1981 the Post-Intelligencer is suffering its second worse year since 1969. Losses are running at the $2,663,120 level, one million dollars more than 1980 (Hearst 77C, 44A). The optimism of the Intervenors and the Antitrust Division is founded on little more than hopeful speculation and conjecture, ungrounded in reality. Nothing has happened to justify such assertions and optimism. They lack credibility or persuasiveness in comparison with the 13 years of steady downward trend, continuing to the present, of the Post-Intelligencer in all its vital signs.

Finding 146, App. 130a. Petitioners now present the same factual arguments to this Court. *See* Petition at 19.

The sparse record with respect to "would-be buyers" is accurately and completely summarized by the court of appeals, App. 14a n.5, and need not be discussed further here.[18] More to the point, there is no conceivable reason why "*different* management . . . should be tried" merely for the sake of experimentation. *See* Petition at 19 n.13. If, on the record as a whole, it is probable that the P-I cannot be made profitable—whether under the ownership of Hearst or of anyone else—sale cannot be an "alternative solution," and the issue of

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(footnote continued)

fact, according to the testimony, no newspaper has ever been able to pull out of a "downward spiral" similar to the one affecting the P-I. Tr. 277.

[18] The court noted that no offers for the P-I had been received, only "inquiries." App. 14a. In fact, the record does not even support Petitioners' pivotal claim that those making *current* "inquiries" were "rebuffed." *See id.* n.5.

whether the P-I can be sold becomes irrelevant.[19] Since the Attorney General and the court of appeals both found that the record "amply supports" such a conclusion, App. 60a; 22a, that conclusion disposes of the "buyer" issue.

B. The Applicants Were Not Required To Show That Closure Had Been Considered In The Event The JOA Were Denied.

Petitioners contend that the Act requires the Applicants to show the P-I is "in practical danger of closing," Petition at 16, and that no such showing has been made here. Again, Petitioners misread—or attempt to side-step—the factual findings. Although the Act does not require proof of probable closure,[20] the ALJ and the Attorney General made findings more than sufficient to satisfy such a requirement, even if it existed. As the district court recognized, "the ALJ did actually consider and apply 'the likelihood of actual closure' factor in applying the 'probable danger of financial failure' test." App. 46a.[21] The district court further observed, "The issue before the court, therefore, is not the correctness of the legal standard, but whether the evidence in the record supports the ALJ's conclusion." App. 46a-47a. At every level of the proceedings below, it was determined that the ALJ's conclusion was amply supported by the record.

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[19] Although non-salability is not an element of the standard in the Act, the Attorney General was clearly correct in rejecting as speculative the ALJ's proposed finding that the P-I could be sold. App. 60a n.*; *see* App. 13a-15a.

[20] Contrary to the assertion at pages 9-10 of the Petition, the Act is not "a last resort to prevent the actual closure of a newspaper." Rather, the Act is designed to permit a newspaper to enter into a JOA while its competitor is still willing to agree to one, and before it has been "led . . . to the crisis point demanded by the failing company doctrine. . . ." *Hearings on H.R. 279 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. 12 (1969) (statement of Rep. Matsunaga). The "last resort" would be a fire sale for the value of the paper's equipment and real estate.

[21] The ALJ concluded:

> If the Post-Intelligencer were a free standing, separate and independent newspaper, not owned by Hearst [the standard by which the Act requires a failing newspaper to be evaluated], *the record in this proceeding is sufficient to prove that it would be in probable danger of closure.* In view of the annual losses it has sustained since 1969, the evidence establishes that *it probably could not have continued to exist.*

(footnote continues)

Petitioners assert that "[t]he Court of Appeals has recognized that Hearst or a successor will continue to operate the P-I competitively if the exemption is denied . . . ." Petition at 17. The court of appeals did no such thing, but rather merely accepted, "[f]or purposes of this issue, . . . [Petitioners'] assertion that Hearst never considered closing the P-I, even should the joint operating agreement not be allowed." App. 23a.[22]

To try to bolster their "probable closure" argument, Petitioners resurrect the "incremental analysis" issue urged at the hearing by the Antitrust Division [23] and rejected by the ALJ and the Attorney General as impermissible under the Act.[24] This issue is not properly before this Court. It was not referred to in Petitioners' Complaint, and the district court expressly noted that it had not been raised. App. 40a n.2.[25]

(footnote continued)

> Were it not for infusions of capital from Hearst, the probabilities are that the Post-Intelligencer *would have failed long ago.*

App. 139a (emphasis added). Hearst's President testified that without the JOA, the P-I would "at some early time cease to operate." Tr. 2198.

[22] Although Petitioners stress Hearst's failure to "consider closing" the P-I, Hearst's reasons were obvious (and totally different from those advanced at page 19 of the Petition): there was no need to consider closing the P-I because Hearst had been able to agree with the Times on a JOA and believed that it would be approved.

[23] As noted earlier, the Regulations make the Assistant Attorney General in charge of the Antitrust Division a party in the hearing, 28 C.F.R. § 48.10(b), App. 213a, but give him no adjudicative function. His "opinions are not law," *Shafer v. Bulk Petroleum Corp.*, 5 Trade Reg. Rep. (CCH) (1983-2 Trade Cas.) ¶ 65,586 at 68,909 (E.D. Wis. Aug. 15, 1983), and are entitled to no more weight than those of the other parties.

[24] The Cincinnati ALJ also determined that incremental analysis was not permitted by the Act. *Cincinnati Recommended Decision* at 131.

[25] It might be noted that incremental analysis, which assumes that valuable services should be provided to the P-I by Hearst free of charge, is merely a variant of the "deep pocket" doctrine, and that its application would violate the "regardless of ownership or affiliations" language of 15 U.S.C. § 1802(5). Moreover, when properly and completely applied in accordance with the testimony of the Division's accounting expert, the analysis shows that Hearst derives no "net benefit" whatever from the operation of the P-I, but rather a substantial "net detriment." Tr. 2583-84, 2588; DSER at 341, 344; *see* App. 112a-115a, 147a-149a.

C. The Act Requires No Inquiry Into The Competitive Impact Of The JOA Or Its Provisions.

Petitioners argue that a proposed JOA cannot be found to "effectuate the policy and purpose" of the Act unless the applicants first demonstrate that it will not injure competing media and that it has been structured in the least "anticompetitive" form possible. Both branches of this argument are devoid of legal foundation, ignore the clearly expressed congressional intent, and have been rejected by the ALJ, the Attorney General, the district court, the court of appeals, and even the Antitrust Division.[26] As the court of appeals said, the Act embodies "a policy determination that the preservation of editorial diversity through joint operating agreements outweighs any potentially anticompetitive effects this antitrust exemption might cause." App. 26a.

Congress considered the possible effects a JOA might have on other media, but chose to protect such media by section 4(c) of the Act, 15 U.S.C. § 1803(c), App. 203a, which subjects a JOA to all pertinent antitrust statutes except as specifically exempted in the Act. That Congress thought no other protection was necessary is made clear by the Senate Report, which states at page 5, "Section 4(c) is to protect the competitive position of newspapers which share the market with a joint operating arrangement." The court of appeals correctly called section 4(c) "an important safeguard." App. 26a. There is no legal support whatever for the proposition that the Attorney General should have considered the JOA's p tential effect on other media. *See* App. 26a-27a n.11.

Petitioners' claim of harm, aside from being irrelevant, is not supported by the record. Petitioners charge that the "editorial voices of the smaller newspapers" will be "substantially diminished or silenced" by the JOA, and claim that "the record here shows unmistakably that neighborhood and subur-

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[26] *See, e.g.*, App. 27a; 47a-48a; 143a-145a, 149a-150a; Transcript of Prehearing Conference of Oct. 6, 1981 at 51, CR 100. It should be noted that the Regulations do not contemplate consideration of such issues, and do not require that the material to be submitted with a JOA application include any information concerning effects on competing media or the possibility of a less "anticompetitive" form of JOA. *See* 28 C.F.R. § 48.4.

ban newspapers will be harmed."[27] Petition at 21. But Petitioners' only evidence was the testimony of representatives of two suburban publishers, both of which would benefit from closure of the P-I. Their papers have been experiencing rapid, multifold growth in the recent past. Tr. 3350, 3359, 3362-63, 3983, 3987. Neither of the witnesses professed to have any knowledge of what effect, if any, JOA's in other cities have had on suburban papers, Tr. 3345-46, 3988, and their testimony as to what they thought would happen in Seattle was nothing but untutored supposition. The district court correctly characterized Petitioners' assertion of harm as "speculative." App. 48a.[28]

Petitioners argue that if the JOA "is *unnecessarily* destructive of competition between the two applicants, it should clearly be disapproved."[29] Petition at 23. But there is no claim that the JOA goes beyond the scope of the activities which are expressly permitted by the Act. *See* 15 U.S.C. § 1802(2), App. 201a. As the Senate Report states at page 4, "The lawful conduct that parties to a joint arrangement may engage in is stated [in the Act] with particularity." Congress wisely reserved to the newspapers involved, not to the Attorney General (or to a group of self-interested competitors), the decision as to which of the permitted activities would be appropriate, workable and adequate in a given situation. Nothing in the Act or its

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[27] In connection with Petitioners' claim of harm, it is worth noting that Valley Publishing Company, the owner of three of the four suburban daily newspapers originally involved in this case, has withdrawn. Petition at 5 n.3. Although Valley may have been "dissolved" as a corporate entity, as Petitioners claim, the newspapers it published in the P-I's primary marketing area remain very much alive under new ownership.

[28] Petitioners mistakenly say that "[t]he Court of Appeals, similarly, has assumed that smaller editorial voices *would* be injured . . . ." Petition at 22 (emphasis added). At most, the court said that, assuming *arguendo* that the JOA would have anticompetitive ramifications, Congress has decided that "those possibly harmful effects were outweighed by other considerations . . . ." App. at 28a. It might also be noted that a study presented to the district court in connection with a preliminary motion indicated that suburban papers in other markets are not injured by JOA's. DSER 453-61.

[29] Petitioners presented no evidence to support the claim that a lesser form of JOA could preserve the P-I. In fact, the JOA contains no more than what is common in other JOA's. The suggestion that the JOA is atypical in its duration, Petition at 23, ignores the fact that the Albuquerque JOA is now 50 years old. *See* House Report at 4, *reprinted in* 1970 U.S. Code Cong. & Ad. News 3547, 3549.

comprehensive legislative history even hints that the Act requires a search for the theoretically least anticompetitive form of JOA that would permit the failing paper to survive.[30]

D. The Act Does Not Violate The First Amendment.

As both courts below properly recognized, the Act regulates economic conduct, not freedom of the press. Nonetheless, Petitioners have made two First Amendment arguments: (a) that the Act is unconstitutional as applied because it grants to the Applicants an antitrust exemption which the publisher-Petitioners do not have (even though they have not applied for the exemption); and (b) that the Act is unconstitutional on its face because it gives administrative discretion to the Attorney General in granting the exemption. The court of appeals' rejection of both arguments is in total accord with the decisions of all other courts to address those arguments, and does not conflict with any decisions of this Court. Moreover, Petitioners lack standing to raise either argument.

1. Petitioners lack standing.

Standing is a fundamental principle that requires a party alleging unconstitutionality to show that he has suffered "injury in fact" caused by the challenged governmental action, and that a "nexus" exists between that injury and a constitutional or statutory guarantee which protects him. *Warth v. Seldin*, 422 U.S. 490 (1975); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152-53 (1970). Petitioners cannot satisfy either of these requirements.

Petitioners' first argument—that the Act is unconstitutional as applied—depends upon an allegation that the "effect" of the Attorney General's Order will be to harm the competitive

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[30] Paul Rand Dixon, then Chairman of the FTC, unsuccessfully complained that the Act "does not require inquiry into the adequacy of [a] less restrictive alternative before a more restrictive arrangement is arrived at." *Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 3094 (1968); *see also* Senate Report at 10 (letter from Mr. Dixon) ("There is no discretionary authority to prohibit . . . [a JOA] . . . that imposes excessive and unnecessary anticompetitive restrictions." "There is no provision . . . for a [JOA] to be terminated once the failing partner has recovered his economic health.").

position of the suburban publisher-Petitioners. The competitive "injury in fact" alleged by them, however, is purely speculative, without credible support in the factual record. *See* App. 48a; *cf. Warth v. Seldin*, 422 U.S. at 505-07 (plaintiffs must show a causal connection between governmental action and injury in fact); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39-40 (1976) (no standing where there is only a speculative causal relationship between government action and alleged injury in fact).[31] Petitioners have also failed to show the requisite "nexus" between the alleged competitive injury and the First Amendment, which does not provide protection from incidental economic harm resulting from governmental action. *See Associated Press v. United States*, 326 U.S. 1 (1945); *Associated Press v. NLRB*, 301 U.S. 103 (1937). Moreover, Petitioners ignore the protection afforded by the Act itself, which expressly provides that predatory conduct is not exempted from the antitrust laws by the Act. *See* 15 U.S.C. § 1803(c), App. 203a.[32]

Petitioners' second constitutional argument requires them to represent parties who are not before this Court, namely, the imaginary publishers who *might* apply for antitrust exemptions under the Act and whose applications *might* be denied by the Attorney General because of improper political motivations. Such conjectural claims on behalf of unknown (and probably nonexistent) third parties are routinely rejected by this Court for lack of standing. *See, e.g., O'Shea v. Littleton*, 414 U.S. 488 (1974) (plaintiffs held to lack standing because they were unable to point to actual or imminent criminal prosecutions against them). The Petition should be denied, among other reasons, because Petitioners lack standing with respect to the constitutional issues.

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[31] Indeed, the JOA, which will enable the P-I to survive, may only prevent the suburban newspapers from gaining a competitive *advantage* from the P-I's failure. *Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489-90 (1977).

[32] Because Petitioners' alleged future injuries are only speculative, the Court is presented with no factual record upon which it could base an analysis of the protection afforded by 15 U.S.C. § 1803(c).

2. No conflict exists between the decision below and the decisions of this or any other court.

Petitioners stress that this is the first case challenging the constitutionality of the Act to reach this Court, but fail to show how this fact militates for a grant of the Petition rather than against it. This Court is not constrained to pass upon the constitutionality of all acts of Congress; indeed, constitutional issues are to be avoided, if possible. *Alma Motors v. Timken Co.*, 329 U.S. 129, 136 (1946). This is especially so where, as here, there is a total absence of any conflict between the decision below and the decisions of this or any other court.

Opponents of other JOA's have raised the same constitutional arguments raised here, and have consistently met with failure. The court of appeals correctly agreed "with the district court's rejection of [Petitioners'] assertion that these cases are distinguishable because the plaintiffs there were challenging preexisting joint operating agreements." App. 28a.

In *City and County of Honolulu v. Hawaii Newspaper Agency, Inc.*, 7 Media L. Rep. (BNA) 2495, 2498 (D. Hawaii 1981), the court rejected the claim that the Act abridges freedom of the press:

> It should be noted that freedom of the press is, of course, constitutionally mandated; whereas, antitrust laws are creations of Congress. Such congressional enactments may be withdrawn or repealed in their entirety without creating any impact upon the first amendment. I conclude that limited withdrawal of anticompetitive protection, which the [Act] affords, does not abridge the freedom of the press.

Similarly, in *Bay Guardian Co. v. Chronicle Publishing Co.*, 344 F. Supp. 1155, 1158 (N.D. Cal. 1972), the court held:

> Here the Act was designed to preserve independent editorial voices. Regardless of the economic or social wisdom of such a course, it does not violate the freedom of the press. Rather it is merely a selective repeal of the antitrust laws. . . .

> Such a repeal, even when applicable only to the newspaper industry, does not violate the First Amendment.

Bay Guardian also rejected the argument that the Act somehow conveys a government license:

> Much of plaintiffs' argument seems directed at a phantom Act which conveys a government license to monopolize to certain newspapers at the expense of others. Whatever might be the constitutional status of such an Act, it is not the one now before us. The Act pertinent to this case does not confer any license to monopolize and indeed has a specific provision prohibiting "predatory practices" (§ 1803(c)).

Id. at 1157-58. Both courts rejected the argument advanced by Petitioners here that the Act's exemption is not available to all newspapers. *Hawaii Newspaper Agency*, 7 Media L. Rep. at 2498; *Bay Guardian*, 344 F. Supp. at 1158; *see* App. 29a ("[T]here is no question that other newspapers in the Seattle area, large or small, may participate in a joint operating agreement if they qualify.").

Although Petitioners must concede that there is no direct conflict between the decision below and the opinions of this Court, they suggest that the reasoning of the recent holding in *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 75 L. Ed. 2d 295 (1983), supports their claims. The suggestion cannot withstand analysis.

In *Minneapolis Star*, the Court held that differential application of a state's *taxing power* to newspapers was unconstitutional under the First Amendment where no special circumstances justified such treatment. Central to this holding was the historically-based understanding that the power to tax the press is akin to the power to censor or license the press. *See* 75 L. Ed. 2d at 303-05; *Grosjean v. American Press Co.*, 297 U.S. 233, 244-45 (1936) (noting a special concern under the First Amendment with "taxes on knowledge"). This understanding was based, in part, on the beliefs and experiences of those supporting the enactment of the First Amendment that devices such as the Stamp Tax or other "taxes on knowledge" could be used by the government to control or limit freedom of the press.

See Minneapolis Star, 75 L. Ed. 2d at 303, 304; 1 B. Schwartz, The Bill of Rights: A Documentary History 466, 474, 527, 566, 575-76 (1971) (indicating an awareness by both Federalists and Anti-Federalists of the dangers of taxes on publication or circulation). The *Minneapolis Star* holding cannot be divorced from this special protection from such taxes, comparable only to the protection from prior restraints, intended by those responsible for adoption of the Bill of Rights. *See Minneapolis Star*, 75 L. Ed. 2d at 304 n.6; *Grosjean*, 297 U.S. at 244-45. This historically-based solicitude does not apply to an Act creating a limited antitrust exemption that is available to *all* newspapers. There is simply no comparable history of governmental abuse of such a regulatory exemption.

Minneapolis Star was dependent as well on the complete absence of legislative history establishing any substantial basis for the disparate treatment of newspapers. *See* 75 L. Ed. 2d at 301 n.3, 302, 303, 305. Here, in contrast, the Court is asked to review the constitutionality of an Act which is supported by a lengthy legislative history, replete with explanations of the special economic characteristics of the newspaper industry that, absent the Act's exemption, cause the loss (without replacement) of failing newspapers. *See, e.g.*, Senate Report at 4 (special characteristics of newspaper industry relating to failing company doctrine); 116 Cong. Rec. 1786-87 (1970) (statement of Sen. Bennett) (unique characteristics of newspaper industry); 116 Cong. Rec. 1785-86 (1970) (statement of Sen. Inouye) (downward cycle of losses in circulation and losses in advertising).

Finally, and most telling, *Minneapolis Star* involved a taxing statute that, on its face, applied only to a small number of newspapers, and had no counterpart elsewhere in Minnesota's taxing scheme. *See* 75 L. Ed. 2d at 299, 300.[33] As much as Petitioners would suggest otherwise, the Act is nothing like the Minnesota scheme. The Act, on its face, provides an

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[33] Petitioners conveniently ignore that *Minneapolis Star* did not overturn the underlying state *exemption* of newspapers from the sales tax, similar to the exemption from the antitrust laws available through the Act. This reflects the basic fallacy in Petitioners' claims. In essence, they suggest that the

(footnote continues)

exemption that is available to any newspaper that can show it is in probable danger of financial failure—available, in short, to newspapers of all sizes and persuasions. Like its many counterparts in other exemptions from the antitrust laws, the Act abridges no First Amendment freedoms. The decision below in no way conflicts with *Minneapolis Star*.

3. The Act is not unconstitutional on its face.

Petitioners rely upon a patchwork collection of inapposite cases for the proposition that the Act grants unconstitutional "licensing power" to the Attorney General subject to overly vague standards. Petition at 27, 29. The claim appears to be that the decision below conflicts with the opinions of this Court in cases such as *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), and *Lovell v. City of Griffin*, 303 U.S. 444 (1938). This claim is without merit.

The fundamental error in Petitioners' reliance on such cases is the assumption (rejected by both the court of appeals and the district court, as well as by *Bay Guardian*, 344 F. Supp. at 1158) that the Act involves the Attorney General in a "licensing" activity in some First Amendment sense of the term. Licensing, as this Court has made clear, has the same meaning as a prior restraint or system of censorship whereby the press must, in advance, seek government permission to publish or speak. *See, e.g., Shuttlesworth*, 394 U.S. at 150-51 (holding unconstitutional "a law subjecting the exercise of First Amendment freedoms to the *prior restraint of a license*") (emphasis added). The Act, unlike the statutes challenged in *Shuttlesworth* and *Lovell*, does not require government permission to publish or speak; it merely allows a financially distressed newspaper to seek an exemption from the antitrust laws if it can meet well-defined statutory requirements.

(footnote continued)

government cannot act to protect freedom of the press by an exemption from the governmentally-created antitrust laws, even though strict enforcement of those laws may lead to the loss of editorial voices. Such a suggestion disregards the very words of the First Amendment, precluding the government from "abridging" freedom of the press, but not from enhancing it. T. Emerson, The System of Freedom of Expression 414, 415 (1970) (a law must *abridge* freedom of the press in order to violate the First Amendment); *see also Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976) (citing the Act as an example of proper government action which enhances First Amendment freedoms).

Those statutory requirements are more than sufficient to meet the standards of specificity applied by this Court in cases which do (unlike the present case) involve First Amendment issues. Petitioners appear to concede that the "probable danger of financial failure" requirement is sufficiently specific, but claim that the requirement that a JOA "effectuate the policy and purpose" of the Act, 15 U.S.C. § 1803(b), App. 202a, is overly vague. The latter requirement, although it might appear somewhat non-specific if the rest of the Act were disregarded, is made explicit by the first section of the Act, *id.* § 1801, App. 201a, which carefully delineates the congressional "policy and purpose" of maintaining editorial and reportorial independence and preserving newspapers in economic distress. *Cf. Arnett v. Kennedy*, 416 U.S. 134, 161 (1974) (approving standard for dismissal of an employee "for such cause as will promote the efficiency of the service").

Finally, Petitioners' lack of standing is particularly acute in this branch of their constitutional argument. They have not applied for an exemption under the Act and cannot allege that they would be improperly denied an exemption if they did apply; thus, they seek to protect the interests of imaginary third persons. *Cf. O'Shea v. Littleton*, 414 U.S. 488 (1974) (no standing where plaintiffs themselves were not subject to actual or imminent prosecution). Because the Act involves "conduct and not merely speech," Petitioners cannot rely on the overbreadth doctrine to avoid the fundamental requirement of standing. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) ("[T]he overbreadth of [such] a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."); *New York v. Ferber*, 73 L. Ed. 2d 1113, 1130-33 (1982) (the legislation in question must reach a "substantial number of impermissible applications").

The court below properly concluded that Petitioners' constitutional arguments were without substance. There being no conflict with the decisions of this or other courts, those arguments do not warrant the grant of certiorari.

CONCLUSION

Petitioners cling to a view of the facts which is radically different from the facts as found by the Attorney General and upheld unanimously by the court of appeals. The fact-intensive nature of Petitioners' contentions, the lack of conflict among the circuits, and the failure to present any legal question deserving of review by this Court compel denial of the writ. Accordingly, Respondents The Hearst Corporation and Seattle Times Company urge the Court to deny the Petition for writ of certiorari.

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